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No. 09-960

In the Supreme Court of the United States

WILLIAM H. HOGAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF ALASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

KALTAG TRIBAL COUNCIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, for purposes of the Indian Child Welfare Act of 1978, 25 U.S.C. 1901 *et seq.*, a tribal court has concurrent jurisdiction with state courts to initiate and adjudicate a child-custody proceeding about an Indian child, when the child and her biological mother are tribal members and the nonmember biological father does not object to tribal-court jurisdiction, and when the child is not domiciled or residing within a reservation.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. The United States is committed to principles of self-determination and self-government of Indian tribes, including through the development of tribal courts and support for child-welfare systems. See, *e.g.*, 25 U.S.C. 3601 (affirming federal policy of supporting tribal justice systems); 25 U.S.C. 1931-1934 (authorizing grant program for Indian child services); *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 14-15 (1987). In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. In 1978, Congress determined that federal action was necessary to protect tribal jurisdiction over child-custody proceedings involving Indian children because "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. 1901(3). Congress found "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. 1901(4). Congress also found "that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901(5).

Responding to those concerns, Congress enacted the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901 *et seq.* ICWA expresses a preference for tribal jurisdiction over custody proceedings about Indian children, but it also provides procedural and substantive standards to be followed in state-administered proceedings, in order to "protect the best interests of Indian children" and to "promote the stability and security of Indian tribes and families." 25 U.S.C. 1902; see, *e.g.*, 25 U.S.C. 1912-1913 (procedural standards); 25 U.S.C. 1915(a)-(b) (substantive "preference" for placing Indian children with Indian families).

ICWA's applicability turns principally on whether a child-custody proceeding involves an "Indian child," defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the

biological child of a member of an Indian tribe." 25 U.S.C. 1903(4). A "child custody proceeding" is, in turn, defined as including any action for "foster care placement," "termination of parental rights," "preadoptive placement," or "adoptive placement." 25 U.S.C. 1903(1)(i)-(iv). It does not include a custody decision made in a divorce proceeding. 25 U.S.C. 1903(1).

As this Court has explained: "At the heart of * * * ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. Section 1911 lays out a dual jurisdictional scheme." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 36 (1989). Under Section 1911(a), a tribe generally has "exclusive" jurisdiction over proceedings involving an Indian child "who resides or is domiciled within the reservation of such tribe." 25 U.S.C. 1911(a). Under Section 1911(b), there is "concurrent but presumptively tribal jurisdiction in the case of [Indian] children not domiciled on the reservation." *Holyfield*, 490 U.S. at 36. Thus, ICWA requires that, "[i]n any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation," the state court must—upon the petition of the child's parent, tribe, or Indian custodian—"transfer such proceeding to the jurisdiction of the tribe," unless there is "good cause to the contrary" or an "objection by either parent." 25 U.S.C. 1911(b). The tribe may decline to exercise its jurisdiction over a proceeding transferred from state court, *ibid.*; and the tribe may exercise "a right to intervene at any point" in a state-court proceeding. 25 U.S.C. 1911(c).

In addition to ensuring tribes' ability to exercise jurisdiction over child-custody proceedings, ICWA protects the results of those proceedings by requiring the

United States, States, territories, and other Indian tribes to "give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent" that they do for "the public acts, records, and judicial proceedings of any other entity." 25 U.S.C. 1911(d).

b. There are 229 federally recognized Indian tribes in Alaska, including, as relevant here, the Village of Kaltag. See 25 U.S.C. 479a, 479a–1 (authorizing the Secretary of the Interior to publish a list of recognized tribes, including "Alaska Native tribe[s]"); 74 Fed. Reg. 40,218, 40,219, 40,222 (2009) (listing the Village of Kaltag as a federally recognized tribe that has "the immunities and privileges available to other federally acknowledged Indian tribes * * * as well as the responsibilities, powers, limitations and obligations of such tribes"); 58 Fed. Reg. 54,366 (1993) (noting that Alaskan Native tribes have the "right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes").

This Court has held that lands conveyed by the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, do not constitute "Indian country" within the meaning of 18 U.S.C. 1151. *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 532-534 (1998). As a result, most of the land held by Alaska Native tribes is not within a "reservation," as that term is defined in ICWA. 25 U.S.C. 1903(10). Such tribes are, however, expressly included in ICWA's definition of an "Indian tribe." 25 U.S.C. 1903(8).[1]

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[1] The United States agrees with the parties (Reply Br. 4 n.2; Br. in Opp. 2 n.1) that this Court should not expand the question presented (as

2. This case involves a child, N.S., who was born in October 1999. Pet. App. 4a. Her biological mother is a Kaltag tribal member, and her biological father is either a member of, or eligible for membership in, the Koyukuk tribe. *Id.* at 4a, 23a. N.S. is thus an "Indian child" under ICWA, though she has not resided or been domiciled within a reservation. *Id.* at 4a; 25 U.S.C. 1903(4).

During home visits in June and September 2000, a Kaltag tribal social worker found N.S.'s mother passed out or intoxicated and unable to care for N.S. Br. in Opp. App. 6-7. N.S. was placed in temporary custody by the Kaltag Tribal Court for two weeks in June and then taken into emergency custody in September. *Ibid.*

On September 27, 2000, after a hearing, the Kaltag Tribal Court concluded that N.S. was a child in need of aid, declared her a ward of the court, and ordered that she be placed in the temporary custody of her maternal uncle and his wife for 60 days. Br. in Opp. App. 7-8. At the time, the identity of N.S.'s father was unknown. *Id.* at 7. The tribal court instructed the tribal social worker to monitor N.S.'s well being, and requested that her mother become and remain sober for the safety and well being of N.S. *Id.* at 8-9. Between December 2000 and March 2003, the court held several additional hearings and retained temporary legal custody of N.S., because her mother continued to be unable to care for N.S., either because of her continued use of alcohol or her incarceration for a parole violation. *Id.* at 11-12; Br. in Opp. 17.

N.S.'s putative father (from the Koyukuk Native Village) was identified before a March 2003 hearing, of

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amici propose) to address an issue never contested in the courts below: whether the Village of Kaltag is a tribe.

which he received advance written notice. Br. in Opp. App. 12. He did not appear for that or subsequent hearings, and told a tribal social worker that "he did not want his family involved" with N.S. Pet. App. 25a.

On April 22, 2004, the Kaltag Tribal Court granted temporary physical custody of N.S. to Hudson and Selina Sam, residents of Huslia, Alaska. Pet. App. 28a. On July 29, 2004, after another hearing (of which N.S.'s father received written and verbal notice, and at which N.S.'s mother was present), the tribal court terminated the parental rights of N.S.'s birth parents and granted permanent guardianship to the Sams. *Id.* at 24a, 26a. In August 2005, the Sams petitioned their own tribal court to adopt N.S. That court forwarded the petition to the Kaltag Tribal Court, because N.S. was a Kaltag tribal member and that court had already exercised jurisdiction over her. *Id.* at 5a.

On October 14, 2005, the Kaltag Tribal Court held a hearing and issued an order of adoption declaring the Sams to be N.S.'s parents. Pet. App. 21a-22a. The tribal court clerk submitted a Report of Adoption to the Alaska Bureau of Vital Statistics and requested a new birth certificate for N.S. *Id.* at 5a. On January 26, 2006, nearly six years after the Kaltag Tribal Court had first assumed jurisdiction, the Bureau rejected the request because—in a departure from the practice it had followed between 2000 and September 30, 2004—it would not recognize the validity of the adoption order from the Kaltag Tribal Court. *Id.* at 5a-6a; Br. in Opp. App. 2.

3. On September 8, 2006, respondents (the Kaltag Tribal Council and N.S.'s adoptive parents) filed this suit in the United States District Court for the District of Alaska. Pet. App. 6a. The defendants in the district court (petitioners here) are three state officials respon-

sible for issuing new birth certificates recognizing adoptions. Pet. ii. Respondents sought a declaration that the Kaltag Tribal Court's adoption order is entitled to full faith and credit under 25 U.S.C. 1911(d) and an injunction requiring the state officials to issue a substitute birth certificate for N.S. Pet. App. 6a. Both sides sought summary judgment.

The district court rejected petitioners' argument that Section 1911(b) permits only a state court to initiate child protection proceedings for Indian children not domiciled on a reservation. Pet. App. 4a-20a. Relying on this Court's statement in *Holyfield* that Section 1911(b) "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation," 490 U.S. at 36, the court held that it "would be incongruent * * * to find that 'presumptively tribal jurisdiction' requires the [t]ribe to first defer jurisdiction to the state court, and then wait for the state court to transfer the matter to tribal court." Pet. App. 14a-15a. The court further determined that a tribe's jurisdiction over a child-custody proceeding is controlled by "the membership of the child * * *, not the membership of the individual parents." *Id.* at 17a. Finally, the court rejected petitioners' argument that concurrent tribal jurisdiction is precluded by either ICWA or Public Law 280.[2] *Id.* at 18a-19a.

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[2] Public Law 280 (*i.e.*, Pub. L. No. 83-280, 67 Stat. 588 (1953)) "allows [certain] States under certain conditions to assume civil and criminal jurisdiction on [Indian] reservations." *Holyfield*, 490 U.S. at 43 n.16. It does not, however, terminate tribal powers. See, *e.g.*, *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 489 n.32 (1979). In any event, Public Law 280 applies exclusively in Indian country, see 28 U.S.C. 1360(a), making it largely inapplicable in Alaska, see *Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 532-534.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-3a. It held that "[t]he district court's decision that full faith and credit be given to the Kaltag court's adoption judgment is compelled by this circuit's binding precedent." *Id.* at 2a (citing *Native Village of Venetie I.R.A. Council* v. *Alaska*, 944 F.2d 548, 562 (9th Cir. 1991)). The court of appeals explained that, for purposes of a child-custody proceeding, "[r]eservation status is not a requirement of jurisdiction because '[a] [t]ribe's authority over its reservation or Indian country is incidental to its authority over its members.'" *Id.* at 2a-3a (quoting *Native Village of Venetie I.R.A. Council*, 944 F.2d at 559).

DISCUSSION

The court of appeals correctly determined that the tribal court had concurrent jurisdiction to initiate and adjudicate proceedings concerning custody over a child member of the tribe, despite the subsequent discovery that the child's biological father was not a member of the tribe. This case presents no reason to reconsider the longstanding rule providing for concurrent tribal-court and state-court jurisdiction over child-custody proceedings involving Indian children who are not domiciled or residing on a reservation. Moreover, the court of appeals' decision does not conflict with a decision of any federal court of appeals or state court of last resort, and the Alaska Supreme Court is currently considering the issue in this case. Further review by this Court is not warranted.

A. The Court Of Appeals Correctly Held That The Tribal Court Had Concurrent Jurisdiction In A Proceeding About Custody Over A Child Member Of The Tribe

1. The court of appeals' conclusion that the tribal court had concurrent jurisdiction in a proceeding concerning custody of a child who is a member of the tribe is firmly rooted in fundamental principles of Indian law.

This Court has recognized that Indian tribes have "inherent powers of a limited sovereignty which has never been extinguished." *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978) (quoting Felix S. Cohen, *Handbook of Federal Indian Law* 122 (1945)) (emphasis omitted). Tribes continue to "possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Id.* at 323 (citing *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

Tribal jurisdiction over domestic relations, including the welfare of child members of the tribe, lies at the core of that retained sovereignty. See, *e.g.*, *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 42 (1989) ("Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA."); *Fisher* v. *District Court*, 424 U.S. 382, 389 (1976) (pre-ICWA case recognizing that a tribal court had exclusive jurisdiction over an adoption proceeding involving tribal members residing on the reservation); *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886) (tribes are "a separate people" possessing "the power of regulating their internal and social relations").

Indian tribes' retained authority over child-welfare matters is confirmed by ICWA. Section 1911(b)'s scheme of "concurrent but presumptively tribal jurisdiction" (*Holyfield*, 490 U.S. at 36) recognizes inherent

tribal authority over the welfare of tribal children—even when they reside outside of a reservation. By its terms, Section 1911(b) does not constitute a grant of jurisdiction to a tribe over matters involving off-reservation member children; instead, it assumes that tribal-court jurisdiction already exists, and requires that a state court—upon the request of a parent, tribe, or Indian custodian, and absent any objection by a parent or good cause to the contrary—"transfer such proceeding to the jurisdiction of the tribe." 25 U.S.C. 1911(b).

That understanding of Section 1911(b) is borne out by its legislative history, which describes Section 1911(b) as being "intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." H.R. Rep. No. 1386, 95th Cong., 2d Sess. 21 (1978) (*1978 House Report*). Although *forum non conveniens* is a mechanism for transferring venue, it does not create subject-matter jurisdiction in the receiving court. See, *e.g.*, *American Dredging Co.* v. *Miller*, 510 U.S. 443, 447 (1994) (noting the doctrine applies "when an alternative forum has jurisdiction to hear [a] case"). That reliance on *forum non conveniens* principles thus confirms that Section 1911(b) was intended as a means to transfer a pending case from a state court to a tribal court that, independent of ICWA, already possesses jurisdiction over such matters.

2. Petitioners do not contend that any statute has divested Alaska Native tribes of their inherent sovereignty. See Pet. 17 n.12. Instead, petitioners argue that the scope of the inherent powers recognized by the court below "exceeds that recognized by any of this Court's precedents." Pet. 18. In making that argument, peti-

tioners focus (Pet. 17; Reply Br. 5-6) on decisions of this Court observing that, as a "general proposition," the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2720 (2008) (citations omitted). None of those cases, however, implicated the kind of tribal authority that is relevant here.

In *Montana* v. *United States*, 450 U.S. 544 (1981), the Court recognized that, even "without express congressional delegation," tribes retain the power to do "what is necessary to protect tribal self-government or to control internal relations." *Id.* at 564. That power includes authority over the conduct of nonmembers "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. In the cases petitioners invoke (Pet. 17), the Court found that certain forms of tribal regulation did not sufficiently implicate a tribe's political integrity, health, or welfare. In *Plains Commerce Bank*, the Court held that a tribe's inability to regulate the terms under which a non-Indian could sell non-Indian fee land to a non-Indian did not "'imperil the subsistence' of the tribal community." 128 S. Ct. at 2726 (quoting *Montana*, 450 U.S. at 566). Similarly, in *Nevada* v. *Hicks*, 533 U.S. 353 (2001), the Court held that state law-enforcement officers who enter a reservation to execute process related to an off-reservation violation of state law do not "threaten[] or ha[ve] some direct effect" on the tribe's political integrity, health, or welfare. *Id.* at 371 (quoting *Montana*, 450 U.S. at 566).

Here, by contrast, the close relationship between Indian child-custody proceedings and a tribe's political integrity, health, and welfare is undeniable. Indeed,

Congress expressly found in ICWA that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. 1901(3); see also 25 U.S.C. 1902 (ICWA serves "the policy of this Nation to * * * promote the stability and security of Indian tribes"). And the accompanying House Report explained that "there can be no greater threat to 'essential tribal relations' and no greater infringement on the right of the * * * tribe to govern themselves than to interfere with tribal control over the custody of their children." *1978 House Report* 15 (quoting *Wakefield* v. *Little Light*, 347 A.2d 228, 237-238 (Md. 1975)) (ellipsis in House Report).

3. In an attempt to portray child-welfare proceedings as being about something other than a tribe's "internal relations," petitioners focus (Pet. 18) on the "nonmembers" of the Kaltag tribe who were eventually involved in this case: N.S.'s father and her adoptive parents. But ICWA's jurisdictional scheme appropriately focuses on the status of the child at the heart of the custody proceeding, not the identities of other parties (or potential parties). And of course when a child is a tribal member, the child will almost invariably have a parent who is also a member. Neither tribal jurisdiction under Section 1911(a) and (b), nor Section 1911(d)'s requirement to extend full faith and credit to tribal proceedings is subject to an exception based on the membership status of some other party.

Moreover, allowing a tribe's jurisdiction to be ousted by such considerations would be inconsistent with well-established practice outside the Indian context. Under uniform acts governing child-custody proceedings in all 50 States, the principal locus of "jurisdiction to make an initial child-custody determination" is the child's "home

State," and the child's "[p]hysical presence" is "not necessary or sufficient" to make a determination.[3] In this case, by virtue of N.S.'s tribal membership (and residence in the Village of Kaltag), the Village was the equivalent of N.S.'s "home State." The fact that her father turned out to be from somewhere else (*i.e.*, the equivalent of a proceeding with one out-of-state parent) would not have been enough under those rules to preclude jurisdiction in the Kaltag Tribal Court.[4] Similar jurisdictional predicates apply under the Parental Kidnapping Prevention Act of 1980, which generally provides for full faith and credit to be given to state courts' child-custody determinations. 28 U.S.C. 1738A(a) and (c).

4. Finally, petitioners suggest that tribal jurisdiction in a child-custody proceeding involving a nonmember would somehow be inappropriate because parents have due process rights "in the care, custody, and con-

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[3] Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) § 201(a)(1) and (c) (1997), 9(1A) U.L.A. 671 (1999) (followed in 48 States); Uniform Child Custody Jurisdiction Act (UCCJA) § 3(a)(1) and (c) (1968), 9(1A) U.L.A. 307 308 (1999) (followed in Massachusetts and Vermont).

[4] Under the UCCJEA, if there is no "home State" when the proceeding commences, the next basis for jurisdiction arises in a State where "the child and the child's parents, or the child and at least one parent * * *, have a significant connection * * * other than mere physical presence," and "substantial evidence is available * * * concerning the child's care, protection, training, and personal relationships." UCCJEA § 201(a)(2)(A) and (B); UCCJA § 3(a)(2). If the Village of Kaltag were not appropriately analogized to N.S.'s "home State," it would satisfy those additional criteria, because N.S. and her mother each had a "significant connection" other than mere physical presence with the Village of Kaltag (*i.e.*, tribal membership and residence), and there was significant evidence there about N.S.'s care, protection, and relationships.

trol of their children." Pet. 19 (citing *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000); *Parham* v. *J.R.*, 442 U.S. 584, 601-602 (1979)). But the possibility of a due process violation does not go to jurisdiction. Tribal courts are prohibited from denying persons due process. 25 U.S.C. 1302(8). And, to the extent that a particular tribal-court proceeding fails to satisfy due process, that could be a reason to deny full faith and credit to an order that results from the proceeding—but not to contend that the tribal court lacked jurisdiction *ab initio*. See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291 (1980); see also *Jurisdiction of State and Tribal Courts in Child Protection Matters*, 2004 Op. Alaska Att'y Gen. No. 1, at 27 (Oct. 1), http://www.law.state.ak.us/pdf/opinions/opinions_2004/04-019_661040467.pdf (*2004 State A.G. Op.*) ("[F]ull faith and credit requires that the issuing court afford the parties due process[.]").[5]

B. There Is No Conflict With Other Federal Courts Of Appeals Or State Courts Of Last Resort

1. Petitioners contend (Pet. 20) that the decision below conflicts with those of other circuits. But none of the federal cases they cite has anything to do with child-custody proceedings, much less ones that fall within ICWA. In *Nord* v. *Kelly*, 520 F.3d 848 (8th Cir. 2008), for example, the court held that a tribe lacked jurisdiction over a claim against a non-Indian arising from a "commonplace automobile accident" between strangers that occurred on a state highway that was open to the

[5] In this case, there are no allegations that a parent was deprived of due process. In fact, neither the biological nor the adoptive parents have raised any objections to the jurisdiction or proceedings of the tribal court; and the adoptive parents actively seek recognition of that court's adoption order.

public. *Id.* at 854-857. Such a tort suit simply does not bear the same close relationship to "the continued existence and integrity of Indian tribes" that Congress has recognized is necessarily present in custody proceedings concerning a child who is a member of the tribe. 25 U.S.C. 1901(3). The same is true with respect to the off-reservation manufacture, sale, distribution, and advertising of malt liquor that was held to be beyond tribal jurisdiction in *Hornell Brewing Co.* v. *Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1093 (8th Cir. 1998), and the employment-related activities of a nonmember on non-Indian land that were held to be beyond tribal jurisdiction in *MacArthur* v. *San Juan County*, 497 F.3d 1057, 1070-1071 (10th Cir. 2007), cert. denied, 552 U.S. 1181 (2008).

2. Petitioners also assert (Pet. 21) that the decision below conflicts with decisions of the North and South Dakota Supreme Courts. But, again, there is no conflict. In *Roe* v. *Doe*, 649 N.W.2d 566 (N.D. 2002), the court considered a paternity determination, which was beyond ICWA's scope (25 U.S.C. 1903(1)), and it expressly declined to decide whether the tribal court had *concurrent* jurisdiction. 649 N.W.2d at 576. The court held only that a tribal court did not have *exclusive* jurisdiction when there was no evidence that the child was a tribal member or even eligible for tribal membership. *Id.* at 576, 580. Here, by contrast, petitioners do not dispute the tribal court's conclusion that "[u]nder the tribal constitution of Kaltag, [N.S.] is a Kaltag tribal member." Pet. App. 23a; Br. in Opp. App. 10.

The South Dakota Supreme Court's decision in *In re Defender*, 435 N.W.2d 717 (1989), is also inapposite, because it held that, "absent the applicability of the ICWA," tribal courts did not have "exclusive authority

to adjudicate disputes" involving Indian children who did not reside on a reservation. 435 N.W.2d at 722. That decision did not address whether there is concurrent tribal jurisdiction over proceedings—like those here—that are governed by ICWA.[6]

3. Finally, petitioners assert (Pet. 21-22) that review by this Court would alleviate confusion within the Alaska state courts about the scope of tribal jurisdiction under ICWA. In fact, there appears to be little confusion in the Alaska courts. In recent years, the Alaska Supreme Court has twice confirmed the legitimacy of tribal jurisdiction in Indian child-welfare matters. In 1999, in a non-ICWA case between parents who were members of different Alaska Native tribes, that court recognized that, even though those tribes are not located in Indian country, a custody dispute about a child tribal member "lies at the core of sovereignty." *John* v. *Baker*, 982 P.2d 738, 758, cert. denied, 528 U.S. 1182 (2000) (emphasis added). And in 2001, the Alaska Supreme Court further held that Alaska Native tribes are able to accept jurisdiction over cases transferred from state courts under Section 1911(b) without first petitioning the Secretary of the Interior for "reassumption" of jurisdiction under 25 U.S.C. 1918. *See In re C.R.H.*, 29 P.3d 849, 852 (overruling *Native Vill. of Nenana* v. *State*, 722 P.2d 219 (Alaska 1986)).

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[6] Although petitioners identify no case rejecting a tribal court's concurrent jurisdiction in a child-custody proceeding involving a child tribal member, the Montana Supreme Court has upheld concurrent jurisdiction in such circumstances, even when ICWA does not apply. *See In re Marriage of Skillen*, 956 P.2d 1, 18 (1998) ("we hold that when an Indian child resides off the reservation, the state court and tribal court share concurrent jurisdiction" over child-custody dispute).

In fact, any uncertainty about tribal jurisdiction over Indian child-custody proceedings in Alaska appears to stem not from state-court decisions but from a 2004 opinion of the State Attorney General, which reversed a 2002 memorandum recognizing concurrent tribal- and state-court jurisdiction and concluded that "Alaska state courts have exclusive jurisdiction over child custody proceedings involving Alaska Native children" except when "(1) the child's tribe has successfully petitioned the Department of [the] Interior to reassume exclusive or concurrent jurisdiction under * * * 25 U.S.C. § 1918 or (2) a state superior court has transferred jurisdiction * * * in accordance with 25 U.S.C. § 1911(b)." *2004 State A.G. Op.* 2 n.3, 3.

In any event, the Alaska Supreme Court is currently considering whether the 2004 State Attorney General opinion is correct.[7] The pendency of that case would make this an especially odd time for this Court to grant certiorari for the purpose of providing "guidance" to Alaska's own courts (Pet. 22). If the Alaska Supreme Court, consistent with its own precedents in *John* v. *Baker* and *In re C.R.H.*, agrees with the longstanding position of the Ninth Circuit that was reaffirmed in the decision below, any confusion in the state courts will be eliminated. Such a decision would obviate petitioners' fear that tribes might need to "go to federal court and demand that decrees in proceedings involving nonmembers be given effect." Reply Br. 7. It would also confirm

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[7] As petitioners acknowledge (Pet. 22 n.15), in *State* v. *Native Village of Tanana*, No. S-13332 (Alaska S. Ct.), the State of Alaska is challenging an Alaska Superior Court decision finding that tribes retain concurrent jurisdiction to initiate and adjudicate child-custody cases under ICWA. The Alaska Supreme Court heard oral argument in *Tanana* on December 10, 2009.

that this Court's intervention is not needed to eliminate any disagreement between different court systems. Cf. *Johnson* v. *California*, 545 U.S. 162, 164 (2005) (certiorari granted because the Ninth Circuit and the California Supreme Court disagreed on a question affecting the validity of California criminal convictions); *DeCoteau* v. *District County Court*, 420 U.S. 425, 430-431 (1975) (certiorari granted to resolve a conflict between the Eighth Circuit and the South Dakota Supreme Court about South Dakota's jurisdiction over certain lands).

C. Other Considerations Advanced By Petitioners Do Not Warrant This Court's Review

1. Petitioners contend that certiorari should be granted because the court of appeals' decision will have "enormous practical implications." Pet. 25. That assertion, however, rings hollow because the court of appeals' unpublished decision added nothing to "binding" circuit precedent that has already been on the books for almost 20 years. Pet. App. 2a; see also 9th Cir. R. 36-3(a) (unpublished Ninth Circuit dispositions are generally "not precedent").

In any event, petitioners' position is the one that would have adverse practical effects, as this case well illustrates. Petitioners' argument would bar tribal-court jurisdiction over "child custody proceedings involving a nonmember." Pet. i. But there was no "nonmember" involved in the proceeding about N.S. when the Kaltag court took temporary custody in September 2000. Pet. App. 5a. At that point, the parties were N.S. and her biological mother, both of whom were tribal members. *Id.* at 23a. The father's identity was "unknown," Br. in Opp. App. 7, and it remained unknown until March 2003, *id.* at 10—long after N.S. had already been made a ward

of the tribal court. Petitioners' inflexible rule would oust the tribal court of jurisdiction upon the discovery that a nonmember was "involved." It would require a new proceeding to be "initiated" in state court, at which point Section 1911(b) would create a presumption that the proceeding would be transferred back to tribal court, barring an objection from a parent or "good cause." As the district court concluded, that would be an "incongru[ous]" way to implement a presumption in favor of tribal jurisdiction. Pet. App. 14a. Nor would it appear to be calculated to "protect the best interests of Indian children." 25 U.S.C. 1902.

2. Petitioners also express concern that the court of appeals' decision creates incentives for a "race to the courthouse" by Indian tribes, and may impose "[g]eographic burdens" on nonmembers. Pet. 25-26, 28-29. But again, petitioners point to no untoward consequences in the almost 20 years since the Ninth Circuit issued the decision that was followed here. To the contrary, tribes generally seek to work cooperatively with States —and with other tribes, as was the case here—to ensure the best outcomes for Indian children, including, where appropriate, by deferring to state agencies or tribunals. One study found that tribes are selective in their requests to transfer jurisdiction from state courts under Section 1911(b), precisely because States may be able to offer more services under certain circumstances, and because tribes are often able to work cooperatively with States with respect to children in state custody. U.S. Government Accountability Office, *Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States* 31-32 (Apr. 2005) (*GAO Study*); see also B.J. Jones et al., *Indian Child Welfare Act: A Pilot*

Study of Compliance in North Dakota 23-24, 43-44 (Dec. 2000), http://www.nicwa.org/research/04.ICWA.pdf (finding North Dakota tribes rarely request transfer of proceedings to tribal jurisdiction because of disruption for the child, the State's greater resources, and the limitations of tribal-court systems). As petitioners recognize, Alaska Native tribes do not always seek jurisdiction over cases involving tribal children, but instead often choose to defer to or intervene in state court proceedings. See Pet. 4, 12 (the State "is currently overseeing *hundreds* of active cases in which a child has parents who are members of two different tribes"); *2004 State A.G. Op.* 10 (noting that "intervention in state court proceedings is the most common form of involvement in ICWA proceedings for Alaska tribes").

The potential for some "[g]eographic burdens" (Pet. 28) is inherent in *any* child custody proceeding (tribal or not) when two parents live far apart. But that is no reason to systematically prefer state courts over tribal ones. Indeed, in many cases in rural Alaska, as may well have been the case here, the tribal court will be the most (or only) convenient forum for all parties involved. See Alaska Judicial Council, *A Directory of Dispute Resolution in Alaska Outside Federal and State Courts* 19 (Mar. 1999), http://www.ajc.state.ak.us/reports/rjdir99.pdf ("It has been difficult for the State of Alaska to provide its remote areas with law enforcement, child protection, criminal prosecution and defense, court services, and corrections. In many rural communities, tribes have taken on some of the dispute resolution functions that are performed by the state in urban areas."); *id.* at 20 ("[State] justice services and facilities are unequally distributed across the state, causing many problems to go unaddressed."); see also *GAO Study* 32 (noting tribes

are often reluctant to obtain jurisdiction when "the parent lives far from the reservation because the tribe will not be able to provide services or monitor the family").

3. Ultimately, petitioners provide no reason to believe that the established system of concurrent jurisdiction failed to work effectively here. Kaltag tribal social workers identified N.S. as a child in need of aid and took prompt action to ensure her safety. The Kaltag Tribal Court then oversaw N.S.'s welfare, ensured that she was placed with appropriate guardians, provided both biological parents with notice of all proceedings, gave opportunities for both parents to seek custody of the child, and eventually approved a suitable adoptive family. Neither parent objected to the tribal court's jurisdiction, to the venue, or to the conduct of the proceedings.[8] Although a state social worker was aware that N.S.'s mother was unable to care for her, the State did not initiate a child-in-need-of-aid case, or otherwise take action on N.S.'s behalf. Pet. App. 15a & n.21; Br. in Opp. App. 6.

As this case illustrates, a regime of concurrent tribal-court and state-court jurisdiction over child-custody

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[8] Non-tribal-member parents or other interested parties who object to tribal-court jurisdiction, venue, or procedures are not without recourse. Parties, of course, may object in tribal court and request that the case be heard in a different tribal court or a state court. A parent could also initiate his or her own action in state court, or ask the State to do so. Any overlap between state and tribal jurisdiction may be worked out between those courts in individual proceedings. Alternatively, ICWA contemplates that States and tribes may agree upon formal mechanisms for the "orderly transfer of jurisdiction on a case-by-case basis." 25 U.S.C. 1919. In addition, subject to tribal court exhaustion requirements, an interested party could challenge tribal court jurisdiction in federal court. See *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852-853 (1985).

matters involving tribal children is not only correct, but also serves Congress's purposes in enacting ICWA: to "protect the best interests of Indian children" and "promote the stability and security of Indian tribes and families." 25 U.S.C. 1902.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2010